(6)

No. 97-934

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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After two rounds of briefing, the petition seems to meet the traditional criteria for granting review. Respondents fail to show that the six-year debate over the proper standard for assessing constitutional challenges to abortion regulations, both within the Court and among the lower courts, has dissipated or will go away any time soon. They fail in any meaningful way to counter the importance of the questions presented. And, in light of the 16-State *amicus curiae* brief filed by Arizona, they cannot demonstrate that the importance of the dispute over Ohio's partial-birth and post-viability abortion regulations is confined to one State alone.

1. Respondents do not identify a single procedural obstacle to reviewing the questions presented. Whether it be the proper standard for assessing these challenges, the validity of Ohio's partial-birth law, or the constitutionality of the State's post-viability regulations, no procedural impediment of any kind stands in the way of considering each issue.

2. Respondents suggest (Br. 22-26) that the Sixth Circuit's standard for assessing facial challenges to abortion laws does not conflict with decisions of this Court. To sustain the point, however, they must do more than counter the petition. They must attack the Sixth Circuit itself -- which (in every other respect), they urge, correctly resolves the questions presented. The lower court acknowledged (A-12) the marked disagreement over the appropriate standard, then was compelled to side with one school of thought over the other. "Although *Casey* does not expressly purport to overrule *Salerno*," the lower court held (*id.*), "in effect it does." The holding that a line of Supreme Court authority has been implicitly overruled warrants review.

Apparently recognizing this problem, respondents suggest (Br. 22-24, 26) that the *Salerno* principle is mere dictum and has not been followed by the Court in other decisions. Not true. Again, the Sixth Circuit makes the point best (A-11), observing that other abortion decisions follow *Salerno*, including *Rust v. Sullivan*, 500 U.S. 173 (1991), *Ohio*

v. Akron Center for Reproductive Health, 497 U.S. 502 (1990), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Nor, contrary to respondents' suggestions, do these decisions stand alone. Early as well as modern cases embrace the rule, which ultimately dignifies the presumption that given a choice between applying a law in a constitutional or an unconstitutional manner the States will choose the permissible approach. *See, e.g., New York State Club Assn. v. New York City*, 487 U.S. 1, 11 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-505 (1985); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984); *Yazoo and Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912); *Hatch v. Reardon*, 204 U.S. 152, 160 (1907).

Conspicuously missing from the opposition brief is any response to the exchange of views among Justices of the Court over this point during the last six years. *See* Pet. 11; A-14, 15. A division of authority within the Court itself over the proper "line of decisions" to govern a case, *Agostini v. Felton*, 138 L.Ed 2d 391, 423 (1997), ought to be as strong an indicator as there is that a question warrants attention.

3. Respondents next err in suggesting that the lower courts are of one mind on this issue. They claim (Br. 24) that there is "no real conflict" between the decision below and "the decisions of the one court of appeals [the Fifth Circuit] that even nominally continues to adhere" to the *Salerno* principle. Yet again, the Sixth Circuit's decision goes the other way, explicitly acknowledging the conflict. *See* A-12, 14. Respondents also falsely describe the issue. As the petition points out (Pet. 12), the Fourth Circuit also has looked at the question. Yet respondents nowhere respond to that court's statements that "the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive." *Manning v. Hunt*, 119 F.3d 254, 268-69, n.4 (4th Cir. 1997). That

circuit's views deserve at least as much weight as *Casey v. Planned Parenthood*, 14 F.3d 848, 861 (3d Cir. 1994), on which respondents rely (Br. 25 n.9) to assert that the Sixth Circuit "is in complete harmony with all other federal courts to consider the question."

Neither is it plausible to suggest that the Fifth Circuit's position will change or that it only "nominally" follows this approach. Not just once, but twice, the court has explicitly said that *Casey* did not overrule *Salerno* in the abortion context. *See* Pet. 11-12. And the more recent of those decisions, just last year, *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997), came on the heels of suggestions that this lower-court conflict of authority would disappear over time. *See Janklow v. Planned Parenthood*, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting denial of certiorari). It has not. *See also Okpalobi v. Foster*, 981 F.Supp. 977 (E.D. La. 1998).

In a similar vein, respondents suggest (Br. 25) that the 1992 and 1997 Fifth Circuit decisions might "have been decided the same way even if that court had utilized the 'large fraction' test." (Quotation omitted). That, too, does not help them -- first, because it is speculative; second, because it points to still another reason for granting review. As things now stand, a litigant in respondents' position may always suggest that a case may have come out the same way under the "no set of circumstances" or "large fraction" view. That is because the meaning of the latter test remains unclear. As applied by the Sixth Circuit, in fact, the standard potentially goes further than overbreadth itself. The court says (A-12 (quotation omitted)) that a facial attack should succeed if "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Even in the context of free speech challenges, the Court does not measure the "fraction" of invalid applications by

eliminating from consideration all situations where it may validly be applied: The "overbreadth of a statute" must be "judged in relation to the statute's *plainly legitimate sweep*." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added); *see Osborne v. Ohio*, 495 U.S. 103, 112-13 (1990); *New York v. Ferber*, 458 U.S. 747, 770 (1982).

Respondents do not dispute the contention (Pet. 21) that *Casey* and *Salerno* may be reconciled because the *Casey* provision rested "on a fundamentally mistaken premise." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 966 (1984). They instead embrace this position, but mistakenly argue (Br. 25-26) that just such a "premise" infects Ohio's regulation of partial-birth abortions. Consider that argument, however, in the context of an application of the Ohio partial-birth law to a fetus that (all agree) is viable and to a mother that (all agree) would not be impaired physically or mentally by delivering the child. The only "premise" that would prohibit the 19 States that have such bans from enforcing them is the view that government may not prevent a woman "from making her own decision" in this setting. Resp. Br. 26. Yet not just *Casey*, but *Roe* as well, would permit a State to allow the child to be born. Ohio, however, no longer may do so in light of the lower court decision.

4. Respondents defend (Br. 26-28) the lower court's extension of overbreadth review to vagueness claims, arguing that it does not establish a conflict and that overbreadth applies in this setting whenever any "constitutionally protected" actions -- not just free speech claims, in other words, but any constitutional claims -- are implicated. They are wrong on both fronts. Once again, the best conflict response comes from the decision below. In some instances, the Sixth Circuit held, "the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications," as under *Salerno* or

under *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); but in other cases, the Court "has suggested that a criminal statute may be facially invalid even if it has some conceivable application." A-19 (quoting *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 251-52 (6th Cir. 1994)). The issue begs review.

The suggestion that overbreadth applies whenever the litigant's conduct implicates another constitutional claim also represents a striking expansion. It enlarges a dispute about whether overbreadth applies to a class of substantive due process claims into one about whether overbreadth governs most vagueness claims as well. Whether true or not, such a proposition dramatically expands (rather than contracts) the reasons for granting the writ. Not only would this extend overbreadth review to a new area, but at this stage the theory has only the slender support of a series of free speech cases that loosely refer to "constitutionally protected" conduct. *See Kolender v. Lawson*, 461 U.S. 352 (1983); compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 168 (1972) (overbreadth "doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment"). Acceptance of this argument also would allow courts to impose a pre-viability standard of review on post-viability claims. Yet "[n]o court," as the Sixth Circuit acknowledged, "has considered whether *Casey* displaces *Salerno* in cases involving facial challenges to post-viability abortion regulations." A-16. *Casey*'s explicit recognition of the State's strong interest in protecting life after viability is not compatible with overbreadth review in this setting.

5. The opposition brief fails to show why the issues presented do not raise important federal questions. The most respondents have done (Br. 2-3) is to suggest that Ohio's partial-birth regulation differs from the laws of the 16 other States (now 18, *see* 1997 Ill. Legis. Serv. P.A. 90-560

(West), 1997 N.J. Sess. Law Serv. Ch. 262 (West)) that regulate this procedure. Unlike Ohio's provision, they say (Br. 3), the other "partial birth abortion bans do not even attempt to exclude from their scope any abortion procedures at all." Surely that overstates the matter. Even the legislative definitions of a partial-birth abortion that differ from Ohio's limit "abortion procedures." Illinois, to use one example, prohibits "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." 1997 Ill. Legis. Serv. P.A. 90-560, section 5. That description plainly covers an abortion procedure, clearly parallels the description of the procedure that respondent Dr. Haskell initiated, and certainly overlaps with Ohio's attempt to regulate this very type of abortion.

In addition to sharing the same goal as Ohio in enacting these partial-birth laws -- curbing the procedure that Ohioan Dr. Haskell developed -- the vast majority of States with such laws joined the 16-State *amicus* brief filed by Arizona calling for review. All told, 13 of the 19 States with partial-birth regulations support review. One reason for their support is respondents' extensive argument (Br. 15-19) that partial-birth statutes generally impose an undue burden, a contention that covers every partial-birth law in existence. Notably, respondents do not dispute the contention (Pet. 16) that Ohio's other post-viability regulations mirror those in many other States.

6. Respondents start their merits defense of the Sixth Circuit's partial-birth analysis by distancing themselves from it. They initially argue (Br. 13-14) that the *district court* was correct in finding the law impermissibly vague because it covers D&E abortions; they then contend (Br. 14-15) that the Sixth Circuit correctly found it to be an undue burden for like

reasons. But the statute simply does not ban the D&E procedure, first and foremost because a D&E does not terminate a pregnancy by purposely inserting the suction device into the fetal skull to evacuate its contents. Any suctioning of fetal brain tissue in a D&E is incidental to the removal of the dismembered fetus from the uterus, making it "neither purposeful nor the means of terminating the pregnancy." A-61-62 (Boggs, J., dissenting). The record evidence makes clear, moreover, that doctors who perform abortions have no difficulty discerning the conduct prohibited by the statute. *See id; cf.* Dr. Doe 1, 12/5 TR at 84 (acknowledging that he did not perform a D&X); *id.* at 65 (stating that in the D&E procedure, insertion of the suction device into the skull was by "serendipity"); Dr. Goler, 12/6 TR at 128 (in D&X, insertion of suction device into skull is purposeful; in the D&E, it is by "happenstance"). (Petitioners of course have not "abandoned" (Opp. Br. 15 n.7) the argument that the statute's exclusion for suction curettage covers the D&E procedure. That is simply one more indicator, though far from the only one, that Ohio has not banned this conventional procedure.)

Nor, as respondents further contend (Br. 15-18), does the statute impose an undue burden simply by regulating the D&X procedure itself, whether in the setting of a pre-viability or a post-viability abortion. Respondents' repeated concern about the effect of this law on the health of the mother neglects to account for the law's exemption, which applies whenever other abortion procedures pose a greater risk to the mother's health. See R.C. 2919.15. Add to this the fact that the partial-birth procedure is not commonly used and is not generally available, and it becomes clear that the regulation of partial-birth abortions by no means constitutes an undue burden.

Respondents err in turning to *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), to bolster this contention. It struck a ban on saline injection abortions because the undisputed evidence showed that it was the most commonly used method of abortion and that the proffered alternative was not available to women in Missouri. *Id.* at 75-79. By contrast, respondents ask the courts to constitutionalize a unique, rarely-used, and recently-developed procedure.

Respondents' construction of a hypothetical class of women affected by the D&X statute – those women who desire to have D&X abortions and for whom the D&X would be the safest available abortion procedure – has no basis in fact or in the record. The lower courts never found that other alternative abortion procedures are unsafe or unavailable. *See* A-110-12; *cf.* A-56 (Boggs, J., dissenting). Nor could they have made such findings in light of the conclusion of the American Medical Association that it "is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development," A-59 (Boggs, J., dissenting) (quoting AMA Board of Trustees Statement of May 19, 1997), and in light of the record evidence, *see* Dr. Giles, 11/13 TR at 277; 12/8 TR at 17-24. Of course, even if one were to assume, contrary to this statement and this evidence, that there are women for whom the D&X would be the only appropriate abortion procedure, the generous exception for cases in which other abortion procedures pose greater risk to the woman's health would permit a D&X abortion to be performed.

7. In defending the court of appeals' conclusion that the medical-necessity exception lacks a scienter requirement and therefore is impermissibly vague (Br. 19-21), respondents offer no response to the contention that the statute *does* contain such a requirement. Only "purposely" committed violations, the law

clarifies, offend the statute. R.C. 2919.17. Nor does *Colautti v. Franklin*, 439 U.S. 379 (1979), help respondents. It of course does not overrule the many cases that permit reasonableness to supply the standard of care in a criminal statute. *See, e.g., Cameron v. Johnson*, 390 U.S. 611, 616 (1968). And it specifically reserves the question whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." 439 U.S. at 396. In the final analysis, respondents and the court of appeals make the same mistake: Just because a scienter requirement may supply a *sufficient* response to a vagueness challenge *see Screws v. United States*, 325 U.S. 91, 101 (1945), does not make scienter a *necessary* element of all criminal statutes.

8. Respondents offer nothing new in arguing that substantive due process requires a mental health exception to post-viability abortions. Most notably, they fail even to acknowledge, let alone respond to, the argument (Pet. 26-27) that the Ohio health exception parallels the one upheld in *Casey*. Even the Sixth Circuit admitted the tension between its view and *Casey*'s, acknowledging that "*Casey* does suggest that the Act's definition . . . is constitutional" because it parallels the Pennsylvania regulation upheld in *Casey*. A-42. *See also* A-47, 48. Finally, it is often assumed that terminating a pregnancy is synonymous with abortion. But doctors agree that, post-viability, that is not necessarily the case. The uncontradicted evidence shows that at 23 weeks' gestational age (i.e., at or near viability), no maternal conditions that mandate ending a pregnancy also mandate that fetal life be terminated. 11/13 Tr. at 240-42; *cf.* 12/6 Tr. At 48.

CONCLUSION

For these reasons and those elaborated in the petition, we respectfully urge the Court to grant the writ.

Respectfully submitted,

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